Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-1147

THE FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

v

S. MARTIN TAYLOR, DIRECTOR, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, FRANK PADZIESKI, WALTER CAMPBELL, RAYMOND M. LYONS, AND ALEX FULLER, MEMBERS OF THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS, MICHIGAN EMPLOYMENT SECURITY COMMISSION, ITS DIRECTOR AND COMMISSIONERS, IN OPPOSITION

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The unreported opinion of the United States Court of Appeals for the Sixth Circuit is reproduced in Firestone's Appendix (3a-6a).[1]

[1] Pages of Firestone's Appendix will be cited in parenthesis as (a).

The Sixth Circuit affirmed orders of the United States District Court for the Eastern District of Michigan entered December 12, 1975 (19a-23a) and January 19, 1976 (7a-8a), holding, respectively, that Firestone could not intervene in *UAW* v *Taylor,* [2] to bring a separate action (*Firestone* v *Taylor & UAW*) to assert that two earlier orders of the District Court in *UAW* v *Taylor* were invalid and were not binding upon Firestone. The two earlier orders, entered July 29, 1974, and July 28, 1975, are set forth in Firestone's Appendix at pp 27a-29a and 24a-25a, respectively.

STATEMENT OF THE CASE

A. *UAW, et al* v *Taylor, et al.*

Firestone does not seek *certiorari* in regard to the Court of Appeals' affirmance of the orders entered in *UAW* v *Taylor.* It does, however, seek review of the affirmance of the dismissal of *Firestone* v *Taylor,* which was its own suit brought to set aside *UAW* v *Taylor.* Thus, *UAW* v *Taylor,* although final in all respects, must be considered in evaluating Firestone's Petition for a Writ of Certiorari.

The UAW and a number of women (claimants and potential claimants for unemployment benefits) sued the MESC on their own behalf and on behalf of a class of women similarly situated to stop it from denying unemployment benefits to women who were forced out of work by their employers because of pregnancy. Their complaint was filed on July 16, 1973. In the complaint, they sought declaratory and injunctive

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[2]

The first and main suit *UAW* v *Taylor,* CA 6 No. 76-1474, will usually be called "*UAW* v *Taylor*" or "*Taylor.*" Firestone's new suit, *Firestone Tire & Rubber Company* v *Taylor,* CA 6 Nos. 76-1966 and 76-1967, will usually be called "*Firestone* v *Taylor*" or "*Firestone.*"

relief. The complaint alleged, *inter alia,* that the MESC's denial of unemployment benefits to pregnant employees who were placed on mandatory leave, as required by section 48 of the Michigan Employment Security Act; MCLA 421.48; MSA 17.552, deprived them of the equal protection of the laws, deprived them of privileges and immunities granted Michigan working women, violated Title VII of the 1964 Civil Rights Act, impeded and defeated the purposes and policies of the federal unemployment insurance program, and violated section 303(a)(1) of the Social Security Act. (Appendix below, pp 6-7.) The suit did not seek unemployment benefits for any particular woman or ask that the rating account of any employer be charged for such benefits. It asked that MESC be ordered to stop the automatic denial of claims for unemployment benefits of women forced out of work due to pregnancy without consideration of each woman's ability to continue in her employment. In effect, the suit challenged the presumption implicit in section 48 of the Michigan Employment Security Act that a woman was unable to work and, consequently, ineligible for benefits because she was pregnant.

On August 6, 1973, MESC moved that the complaint be dismissed because UAW and the individual plaintiffs had failed to join as defendants parties who had an interest in the controversy and whose presence was deemed indispensable for adjudication. (Appendix below, pp 10-11.) The trial court never ruled on this motion.

Pursuant to the request in the complaint, a 3-judge court was convened on September 13, 1973. After a brief hearing in chambers, at which counsel for both sides were present, then Court of Appeals Judge Wade H. McCree and then District Judges Damon J. Keith and Cornelia G. Kennedy concluded that the case should be remanded to a single judge, because the panel questioned whether the claim that the state statute involved was (unconstitutional) presented a substantial issue.

(Appendix below, p 71.) Nevertheless, the Court granted UAW until July 20, 1973, to file a brief in support of its contention that a 3-judge court was required to decide the merits of the case. On September 17, 1973, the request for a 3-judge court was withdrawn by UAW, and, on September 20, 1973, the 3-judge court entered an order dissolving itself and remanding the case for "consideration of the single judge (Judge Keith) to whom it was initially assigned for determination of whatever federal grounds may be presented by the complaint." (Appendix below, p 71.)

Thereafter, in March, 1974, the case was reassigned to Judge Charles W. Joiner, who scheduled a pretrial hearing for April 15, 1974. (Appendix below, p 74.) At this hearing, which, in point of time, was after the decision of this Court in *Cleveland Board of Education* v *LaFleur*, 414 US 632; 94 S Ct 791; 39 L Ed 2d 52 (January 21, 1974), counsel for UAW and MESC informed the Court that a proposed order satisfactory to the parties would be prepared disposing of the issues raised in the complaint. It was further agreed at this meeting, and the Court so ordered, that a notice would be published in certain newspapers with general circulation in the State of Michigan informing plaintiff class members of the proposed settlement order. In these notices, the class members were informed of the terms of the proposed order and that they would be included in the class affected by the terms thereof, unless they exercised their right to be excluded therefrom by a certain date. The notice also informed the members of the class that the order would be entered on July 29, 1974. The notice was published in the Detroit News, Detroit Free Press, State Journal (Lansing), Flint Journal, Grand Rapids Press, and the Marquette Mining Journal. No objections were raised to the proposed order and, on July 29, 1974, an Order was entered declaring that the MESC's denial of unemployment benefits to any woman employee who was forced out of work due to so-called mandatory maternity leave clauses in contracts or

to unilateral employer policies was unlawful as contrary to federal law (28a). The terms of the order also provided that the MESC was to reopen, rehear, and reconsider, in light of the order, the claims of all claimants denied MESA benefits from and after April 5, 1972, solely due to mandatory maternity leave contract clauses and to leaves of absence unilaterally imposed due to employer policies. Without mention of the Civil Rights Act of 1964, it was further specified in the order that its entry would not prejudice the rights of any claimant who was denied unemployment benefits between June 30, 1965, and April 5, 1972, "to on her own individually request the MESC for benefits which had been denied because of said maternity leave policy" (28a).

The July 29, 1974 order further provided that "[t]his court expressly does not rule on the validity of Section 48, MESC, or the leave of absence portion of said Section" (28a).

Firestone's statement that the Court order was "totally silent" on what provision of federal law was contravened by section 48 MESA is misleading. The order was based upon UAW's complaint and Motion for Partial Summary Judgment (27a). Its complaint set forth several federal laws which were impeded or violated by MESC's application of section 48. UAW's motion for partial summary judgment and brief were based upon these same federal grounds.

Thereafter, in conformity with the Court's order, the MESC issued public notices relative to the contents of the order. It also issued instructions to its operating staff implementing the Court's order. (Appendix below of UAW and MESC, pp 2-5.)

Members of the plaintiff class thereafter filed claims for benefits throughout the state. To obtain wage information from the affected employers, the Commission devised certain forms which were mailed to the employers notifying them of

the Court order and judgment, and why the wage information was necessary. Form MESC 1277 (Appendix below, p 97), accompanied all requests for wage information and informed the employers of the Court order. Unemployment benefits were thereafter paid by the Commission in accordance with the order and judgment of July 29, 1974.

In June, 1975, women who had been employed by the State of Michigan and who had been forced to quit their jobs because of pregnancy filed a motion to be included in the class affected by the Court's order of July 29, 1974. The MESC opposed this order on the ground that such women were not within the plaintiff class. In an order entered on July 28, 1975, the Honorable Charles Joiner held that his order of July 29, 1974, related to a class of persons including all women forced out of work in Michigan due to pregnancy subsequent to June 30, 1965, whether State employees or not. He further held that the Michigan Employment Security Commission instructions to its branch offices of August 24, 1974, implementing the Court's order of July 29, 1974, should be applied for the benefit of the petitioning State employees. (Appendix below, pp 77-78.)

B. *Firestone* v *Taylor, et al.*

On March 31, 1976, while its *UAW* v *Taylor* appeal to the Court of Appeals for the Sixth Circuit was pending, Firestone filed a new suit in the District Court for declaratory judgment, for an injunction and other relief, naming the state officers who were defendants in the *UAW* suit and the UAW as defendants. In this action, Firestone attempted to set aside the July 29, 1974 judgment in *UAW* v *Taylor* and to have the District Court issue a declaratory judgment in direct opposition to that issued in *UAW* v *Taylor*, on the grounds that *UAW* v *Taylor* judgment was contrary to law on the merits of the substantive issues (14a-17a).

Firestone also asked the Court to enjoin the MESC from including in its calculations of the amount Firestone is assessed under the Michigan Employment Security Act, benefits paid to women placed on maternity leave by Firestone, and to credit Firestone's rating account for any amounts charged against it by the state due to *UAW* v *Taylor* (17a). In addition, Firestone requested that the Court declare that federal law does not invalidate section 48 of the Michigan Employment Security Act, MCLA 421.48; MSA 17.552.

The respondents filed motions for summary judgment supported by affidavits and other material. (Appendix below, pp 401a-412a.) Firestone filed no counter affidavits.

On June 17, 1976, the District Court granted respondents' Motions for Summary Judgment and dismissed Firestone's suit, holding that its order of July 29, 1974, issued in *UAW* v *Taylor*, was *stare decisis* upon the complaint (7a-9a).

The Sixth Circuit Court of Appeals affirmed this order granting summary judgment. It also affirmed the order of December 12, 1975, which denied Firestone intervention in *UAW* v *Taylor*.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DENIAL OF FIRESTONE'S MOTION TO INTERVENE IN UAW v TAYLOR.

The District Court's denial of Firestone's motion to intervene in *UAW* v *Taylor*, because of untimeliness, was affirmed by the Court of Appeals. The Court of Appeals also cited Fire-

stone's untimely attempt to intervene in *Taylor* as a reason for affirming the dismissal by the District Court of *Firestone* v *Taylor* (4a-6a).

Firestone does not seek review of the denial of intervention and does not argue that issue in its Petition. It nevertheless attacks this now final determination in its Arguments II and III by asserting that the consent order entered in *UAW* v *Taylor* is not binding on it because it was not represented in that suit. Thus, it, in effect, contends that the refusal to permit its intervention was erroneous.

This totally disregards what the Court of Appeals said when it affirmed the denial. That Court made it plain that untimeliness was not the sole reason for denying Firestone's intervention motion. Another reason for the denial was the fact that Firestone was not a necessary or indispensable party to that action. In pertinent part, the Court of Appeals said (4a):

> "Final judgment in *UAW* v. *Taylor* was entered by agreement of the parties on July 29, 1974. Firestone's motion to intervene was filed November 17, 1975.
>
> "In denying the motion to intervene for lack of timeliness the district court found that Firestone had 'informal and actual notice' of the July 29, 1974 judgment and a subsequent order entered July 28, 1975. This finding is amply supported by the record. The district court found that Firestone was neither a necessary nor an indispensable "party to *UAW* v. *Taylor*, which involved the validity under federal law of the practice of MESC of denying unemployment compensation to employees in Michigan who were forced to take leaves of absence due to pregnancy. We find no such compelling circumstances in this case as would require the district court to permit intervention after entry of final judgment. The district court did not abuse its discretion in denying intervention."

The denial of intervention to an employer in an unemployment case where the validity of a state unemployment compensation law was at issue was recently ordered by this Court in *Ohio Bureau of Employment Services* v *Hodory*, 429 US 814; ..... S Ct .....; ..... L Ed 2d ..... (1976). See also, *NAACP* v *New York*, 413 US 345, 365-367; 93 S Ct 2591; 37 L Ed 2d 648 (1973); *Nevilles* v *Equal Employment Opportunity Commission*, 511 F2d 303, 305 (CA 5, 1975).

In its Argument III, Firestone asserts that the MESC did not adequately represent its interests. This claim was also asserted below.

In rejecting Firestone's contention in this regard, the Court of Appeals said (5a-6a):

> "Finally, Firestone fails to allege facts suggesting that its interests were not adequately represented. Courts have recognized that '. . . a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee.' (citations omitted). *Commonwealth of Pa.* v. *Rizzo*, 530 F.2d 501, 505 (3d Cir. 1976), cert. denied, 426 U.S. 921 (1976). See *Southwest Airlines Co.* v. *Texas Intern. Airlines*, 546 F.2d 84, 98 (5th Cir. 1977), cert. denied, 46 U.S.L.W. 3188 (1977). MESC has the authority to promulgate rules and regulations to carry out the provisions of the Act, M.C.L.A. §421.4; two of its four voting members represent employer interests, M.C.L.A. §421.3. Firestone does not claim that MESC acted in bad faith. Indeed, the record reveals competent representation by the Commission. That its efforts culminated in a consent decree is not evidence *per se* of inadequate representation."

The MESC is represented by the Michigan Attorney General in all legal matters. The MESC *qua* MESC does not represent either claimants or employers. The Attorney General represents the MESC *qua* MESC. The Michigan Employment Security Act, subsection 11(k); MCLA 421.11(k); MSA 17.511(k), specifically provides that the Attorney General of the State shall represent the MESC in any court proceeding. The MESC does not represent either employer or claimant interests in litigation. In legal proceedings, its duty is to propound the law as it interprets it. The statement of the Assistant Attorney General that his office represents the "State and the Commission . . . and no[t] employers necessarily," properly reflects the Commission's role in civil actions. His statement was intended to convey to the District Court that the Commission's position in a judicial proceeding is its own and does not necessarily reflect the position of employers or of claimants.

The Commission has 4 voting members, 2 representing employers and 2 representing claimant interests.

The Court of Appeals found that the Commission was competently represented in *UAW* v *Taylor*. It also found that the culmination of that suit in a consent decree was not evidence *per se* of inadequate representation. The contention in Firestone's brief (22a-23a) that "the state's counsel had conceded that it did not represent employers' interests," consequently, is misleading to say the least.

II.

THE CASE PRESENTS NO SUBSTANTIAL QUESTION.

A.

Firestone's suit was properly dismissed by the Court below on the basis of stare decisis. The doctrines of res judicata and collateral estoppel are also proper bases for dismissal of Firestone's suit.

The District Court held that *UAW* v *Taylor* was controlling in Firestone's suit against MESC and UAW and correctly made *stare decisis* the basis for dismissing Firestone's complaint. The Court of Appeals properly affirmed this holding. Petitioner does not seek Certiorari in *UAW* v *Taylor*. That decision is, therefore, final.

The District Court could have found that Firestone's suit was also barred by the doctrines of *res judicata* and collateral estoppel.

While the facts indicate that all three doctrines could have been applied, any one was sufficient to correctly cause the dismissal of Firestone's action.

All three doctrines are still controlling here.

1. **Stare decisis was an appropriate ground for dismissal of Firestone's case since UAW v Taylor established the rule of law for the case and was in conformance with this Court's holding in Turner v Department of Employment Security, et al, 423 US 44 (1975).**

Stare decisis is a principle of broad application. In essence, it means that for purposes of consistency and permanence, Courts

should let stand those rules of law that have been decided by previous Courts. See 1 B J. Moore, Federal Practice ¶ 0.401, at 11 (2d ed. 1974).

Clearly, Firestone's suit against MESC and UAW raised the exact same questions of law as were decided in *UAW* v *Taylor*. And, indisputably, the suit was instituted to unfound and reverse the District Court's orders in that case.

Firestone did not even attempt to factually distinguish its case from *UAW* v *Taylor*. Since Firestone's complaint could not show that the rule of law in *UAW* v *Taylor* should be overruled in light of this Court's decision in *Turner* v *Department of Employment Security & Board of Review of the Industrial Commission of Utah*, 423 US 44; 96 S Ct 249; 46 L Ed 2d 181 (1975), the District Court correctly dismissed Firestone's action.

2. Firestone's suit is also barred by the doctrine of res judicata.

While the doctrine of *stare decisis* can apply to litigants who had no connection to the litigation which established a given rule of law, the doctrine of *res judicata* applies to parties who have already litigated an issue on the merits and are bound by a valid final judgment. See, 1 B J. Moore, Federal Practice ¶ 0.401, at (2 ed. 1974).

In the case of *Sadro* v *Hamill Mfg, Division of Firestone and MESC*, the Ingham County Circuit Court, No 15738C, citing *UAW* v *Taylor*,[3] found that the MESC could not deny unemployment benefits to women forced out of work by mandatory maternity leave contracts. Ms. Sadro was one of the named

[3] For the *Sadro* material and affidavits establishing service on Firestone, see Appendix below, pp 167-201.

plaintiffs in *UAW* v *Taylor*. Instead of attempting to appeal the correctness of the state court's decision, and, therefore, the correctness of *UAW* v *Taylor*, Firestone let its appeal in *Sadro, supra*, lapse, and, as a result, the judgment entered in that action became a valid final judgment. All of the issues raised in *Sadro, supra*, are the issues which Firestone is attempting to relitigate here.

This is precisely the type of situation to which the doctrine of *res judicata* was meant to apply. See *Cacavas* v *General Motors Corp*, 444 F2d 506 (CA 6, 1971); *International Association of Machinists, Local Lodge No 1038* v *Jeffrey Galion Manufacturing Co*, 350 F2d 512 (CA 6, 1965).

3. The doctrine of collateral estoppel precludes Firestone's suit.

The doctrines of *res judicata* and *collateral estoppel* are often used interchangeably. The effect of judicial finality can obtain through the application of either doctrine.

Stated simply, *res judicata* is meant to prevent parties or their privies from relitigating a cause of action which has been settled by a valid final judgment. Collateral estoppel also prevents parties and their privies from litigating a different cause of action, if the basis for the different cause involves relitigating issues that have already been decided in a previous cause of action.

Firestone, in the instant case against MESC, is attempting to relitigate the substantive issues it could have litigated in *Sadro, supra*. The decision in *Sadro* is *res judicata* and precludes the present action. Firestone is also estopped from collaterally attacking the findings in *Sadro, supra*, in its suit. This is because the parties are identical and the cause of action is the same.

Although Firestone was not a formal party to *UAW* v *Taylor*, it is, nevertheless, collaterally estopped from attacking the orders entered in *UAW* v *Tayor*. As the Court of Appeals stated (6a), the MESC is presumed to have represented its interests in that proceeding, citing *Commonwealth of Pennsylvania* v *Rizzo*, 530 F2d 501, 505 (CA 3, 1976), cert. denied, 426 US 921; 96 S Ct 2628; 49 L Ed 375 (1976). See *Kersh Lake Drainage District* v *Johnson*, 309 US 485; 60 S Ct 640; 84 L Ed 881 (1940); *United States* v *Kabinto*, 456 F2d 1087 (CA 9, 1972).

Given that Firestone was represented in *UAW* v *Taylor*, and that the issues decided in *UAW* v *Taylor* are dispositive of Firestone's case against MESC, the doctrine of collateral estoppel applies to bar its present action.

B.

The District Court in UAW v Taylor had jurisdiction to invalidate a state agency practice which conflicted with federal law.

The petitioner here challenges the jurisdiction of the District Court to enter the orders of July 29, 1974, and July 28, 1975, in *UAW* v *Taylor*, thus, apparently asserting that these orders are not *stare decisis* upon its complaint. In *UAW* v *Taylor*, Judge Joiner, contrary to petitioner's repeated assertions, invalidated no state law. He merely held that a practice of the MESC conflicted with federal statutory law.

Two decisions of this Court that invalidated the operation of state unemployment compensation practices under the Supremacy Clause because they conflicted with federal law demonstrate that the order in *UAW* v *Taylor* falls within the recognized contours of federal judicial power.

The decision in *Nash* v *Florida Industrial Commission*, 389

US 245; 88 S Ct 362; 19 L Ed 2d 438 (1967), is directly in point to the case at bar. In *Nash*, the Court considered defendant State agency's *interpretation* of §443.06 of the Florida Unemployment Compensation Law, which by its terms disqualified an unemployment compensation claimant whose unemployment "is due to a labor dispute in active progress. . . ." 389 US at 235-236. The Florida Commission construed the words "labor dispute" in this provision to include the filing of unfair labor practices charges against a former employer. Applying this construction, the Florida Commission disqualified the unemployed plaintiff from further eligibility because she had filed such charges. This Court held unanimously that the law as thus applied conflicted with the federal policy, expressed by Congress in §8(a)(4) of the National Labor Relations Act. 29 USC §158(a)(4), that persons who report alleged unfair labor practices should be protected against coercion. 389 US at 238.

Although the defendant Commission in *Nash* could not have directly violated §8(a)(4) (just as Firestone alleges, the MESC could not directly violate Title VII), the Commission's application of the statute to deny benefits to the plaintiff Nash "frustrate[d] the enforcement of the [NLRA]" and was "invalidat[ed] under the Supremacy Clause." In so holding, Justice Black noted "we but follow the unbroken rule that has come down through the years" 389 US at 240, citing cases.[4]

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[4]

The unanimous *Nash* court stated:

> We have no doubt that coercive actions which the Act forbids employers and unions to take against persons making charges are likewise prohibited from being taken by the States. The action of Florida here, like the coercive actions which employers and unions are forbidden to engage in, has a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board . . . A national system for the implementation of this country's labor policies is not so dependent on state law.

In *UAW* v *Taylor*, as in *Nash*, a federal court declared invalid a *practice* of the State employment security agency which practice was derived from that agency's interpretation of its organic legislation. In both cases, the challenged practice governed the substantive determination of benefit eligibility. In both cases, the invalidation rests on a finding of conflict with federal law. In sum, *Nash* provides persuasive precedent in support of the *Taylor* order.

The only aspect of the *Taylor* order not explicitly at issue in *Nash*, i.e., the granting of injunctive relief, was sanctioned by this Court in *California Department of Human Resources* v *Java*, 402 US 121; 91 S Ct 1347; 28 L Ed 2d 666 (1971). In *Java*, the Court held that a California statute (California Unemployment Insurance Code §1335), which required the withholding of benefits during the pendency of an employer appeal from an initial determination of eligibility, conflicted with the dictates §303(a)(1) of the Social Security Act, 42 USC §503(a)(1), that the procedures of state plans receiving federal funds "be reasonably calculated to insure full payment of unemployment compensation when due." The Court upheld the lower court's injunction against the enforcement of the state statute since the latter was "inconsistent" with federal law, and "tend[ed] to frustrate" congressional intent. 402 US at 135.

Java thus established two relevant principles. First, conflict with federal law is a ground for invalidation of state agency procedures, even if such procedures are mandated by state statute.[5] Second, further state proceedings in accordance with the invalid practice may properly be enjoined, as District Judge Joiner did in the *Taylor* order in *UAW* v *Taylor*.

It follows from *Nash* and *Java* that the District Court was

[5]

And, *a fortiori*, if they are merely derived from a statute by agency interpretation, as in *Nash, supra*, or the case at bar.

acting well within its powers when it entered its order of July 29, 1974, invalidating and enjoining a state agency practice as being in conflict with a federal statute.

C.

Conflict with Title VII constituted a valid basis for invalidation of the MESC practices.

Judge Joiner expressly found in *UAW* v *Taylor* that the MESC practice of denying benefits to women forced out of work on mandatory leaves is "unlawful or contrary to Federal law." The fact that he was not specific as to which federal law conflicted with the practice does not alter the fact that the UAW pointed to at least 4 federal laws which were violated[6] and specifically withdrew the constitutional claim before Judge Joiner ruled (Appendix below, pp 71, 72).

There is ample support in both statute and case law for the proposition that a court may strike down a state statute or practice as conflicting with Title VII of the 1964 Civil Rights Act, as amended, 42 USC §§2000e *et seq*. When faced with state statutes which purported to *require* employers to commit unfair employment practices under Title VII, the courts have not hesitated to invalidate the state laws under the Supremacy Clause. See, e.g., *Rosenfeld* v *Southern Pacific Co*, 293 F Supp 1219 (CD Cal, 1968), affd, 444 F2d 1219 (CA 9, 1971) (California statute and regulations restricting women's hours of work and imposing weight-lifting limits on female employees); *Garneau* v *Raytheon Co*, 323 F Supp 391 (D Mass,

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UAW's complaint alleged that the MESC's interpretation of section 48, MESA, was contrary to section 303(a)(1) of the Social Security Act; contrary to the purposes of the Federal Unemployment Insurance Program; that it impeded Title VII of the 1964 Civil Rights Act; and impeded the operation of the National Labor Relations Act.

1971) (Massachusetts statute restricting women's hours of work); *Jones Metal Products Co* v *Walker*, 29 Ohio St 2d 173; 281 NE2d 1 (1972) (Ohio law banning women from certain jobs and restricting hours of work). Yet it is clear from an examination of Title VII itself that these precedents do not exhaust a federal court's power to invalidate discriminatory state statutes and practices.

Two sections of the Civil Rights Act address the relationship of the federal statute to state law. The intent of both sections was to save the provisions of state anti-discrimination laws, while invalidating state laws inconsistent with the federal statute. See *Rosenfeld* v *Southern Pacific Co, supra*, 444 F2d at 1226. Thus, Title VII specifically lifts the duties imposed by any state law "which purports to require *or permit* the doing of any act which would be an unlawful employment practice under this [Title]". (emphasis added), 42 USC §2000e-7. Similarly, any "provision [of State law which] is inconsistent with any of the *purposes* of this Act, or any provision thereof," is expressly declared invalid under the Civil Rights Act of 1964, by section 1104, 42 USC §2000h-4 (emphasis added). Thus, the federal courts have the power, under Title VII and the Supremacy Clause, to invalidate state laws or practices which *permit* employers to commit unfair employment practices, or which conflict with the *purposes* of Title VII.

Before examining the specific ways in which the practices of the MESC toward plaintiff's class conflicted with Title VII, two suggestions made by Firestone in its brief must be confronted.

The first is that MESC's function of paying unemployment benefits does not fall within the ambit of Title VII. It is true that one court has held that a state employment commission or similar agency is not, in its benefit-paying capacity, an entity covered by Title VII. *Vick* v *Texas Employment Commission* 514 F2d 734, reh denied, 520 F2d 944 (CA 5, 1975). However, *Vick* is irrelevant to the point at hand. Plaintiff did not seek a finding that the MESC *violated* Title VII. UAW sought, and received, from the District Court a finding that certain practices of the MESC are "contrary to Federal law," and, therefore, invalid. One of the federal laws with which the MESC practice was found to conflict is Title VII. The result of an inquiry as to whether or not the MESC, in its benefit-paying capacity, can be said to *violate* Title VII, is not dispositive of the inquiry as to whether or not certain MESC practices *conflict* with Title VII.

Secondly, Firestone implies that the Supreme Court's decision in *Geduldig* v *Aiello*, 417 US 484; 94 S Ct 2485; 41 L Ed 2d 256 (1974), immunizes MESC from attack on Title VII grounds. The short answer to this contention is that the Supreme Court's constitutional analysis in *Aiello* is irrelevant to this case, in which no Fourteenth Amendment issues were ruled upon by the single-judge District Court.[7]

It should be stressed, further, that as to entities covered by both Title VII and the Fourteenth Amendment, it is established that the former imposes greater restrictions than the latter on a state's policies which discriminate against pregnant women. *Berg* v *Richmond Unified School District*, 528 F2d 1208, 1212 (CA 9, 1975). Therefore, even if, *arguendo*, under *Vick, supra*, the MESC in its benefit-paying capacity cannot directly *violate* Title VII, it does not follow that an MESC practice is free from *conflict* with Title VII; and even if, *arguendo*, the

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Several Circuit Courts have noted that reliance on *Aiello* is "misplaced" in cases where analysis of Title VII is called for. *Wetzel* v *Liberty Mutual Insurance Co*, 511 F2d 199, at 202 (CA 3, 1975), vacated on other grounds, 424 US 737; 96 S Ct 1202; 47 L Ed 2d 435 (1976); *Hutchison* v *Lake Oswego School Dist No 7*, 519 F2d 961, 964 (CA 9, 1975).

practice is not prohibited by the Fourteenth Amendment, it may still frustrate the broader requirement imposed by Title VII.

As indicated in Point II. B. hereof, a state agency's interpretation of a state unemployment compensation law in a manner which frustrates implementation of a federal law must bow before the heavier weight of the federal law.

The actions of the MESC in the case at bar clearly fall within the rubric of practices condemned in *Nash, supra.* Here, the "coercive action" is the denial to women, solely on grounds of pregnancy, of income to which they would otherwise be entitled. Such action is forbidden to employers by Title VII. Surely the teaching of *Nash* is that the Supremacy Clause forbids MESC to "frustrate the purpose of Congress" in Title VII by denying women income to which they would be entitled but for their pregnancy. The effect on the employees in both *Nash* and in *UAW* v *Taylor* is the same: total deprivation, not only of wages, but of the statutorily mandated "substitute for wages," as punishment for activity which an act of Congress protects against discrimination. The legislative prohibition against such discrimination cannot be nullified when the state, acting under color of law, functions as a surrogate for discriminating employers.[8]

It is clear that MESC's construction of section 48, MESA,

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The MESC policy at issue here is more objectionable than the practice invalidated in *Nash*. In the latter case, the employer did not actually take the coercive action—discharge of the plaintiff for filing an unfair labor practice charge—which was forbidden by the NLRA. In the present case, the employers *did* force women out of work because of pregnancy, a practice forbidden by Title VII. The MESC's subsequent denial of unemployment compensation *compounded* the illegal discrimination practiced by the employers, rather than merely *substituting* for it, as in *Nash*.

which was challenged by plaintiffs in *UAW* v *Taylor* rewarded those employers in the State of Michigan who committed employment practices unlawful under Title VII. Some employers in the State had a policy of forcing out of work pregnant women who were nonetheless willing and able to continue working. Such policies are unlawful employment practices under Title VII. And yet, MESC's challenged construction of section 48, MESA, purported to recognize the validity of this unlawful policy.

In fact, the challenged MESC practice actually *encouraged* employers to adopt the discriminatory lay-off policy. Since the victims of pregnancy lay-offs were not eligible for unemployment compensation, the employer was relieved of its obligation to defray the costs of compensation, an obligation which was imposed on employers in the case of other involuntary lay-offs. Furthermore, since under MESA an employer's current contribution level is based in part on past rates of compensable unemployment among its employees, the MESC practice of denying compensation to victims of mandatory pregnancy lay-offs effectively lowered the "experience rating" of employers adopting such policies vis-a-vis the ratings of those employers who laid off equal numbers of employees but did not mandatorily and discriminatorily lay off pregnant employees.

In summary, the challenged MESC construction of section 48, MESA, created a financial incentive, both current and future, for employers to discriminate on the basis of sex in violation of Title VII. This construction thus encouraged, and, *a fortiori*, "permitted" the commission of unlawful employment practices by Michigan employers. Under Title VII, 42 USC §2000e-7, any "liability, duty, penalty, or punishment" imposed by such a state practice must be nullified. MESC's duty, imposed by its challenged construction of the statute, was to withhold benefits from unemployed workers otherwise eligible

for them. The District Court, by ordering the MESC to pay these benefits, was carrying out the mandate of Title VII and asserting the supremacy of federal law over a conflicting state practice.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be dismissed.

Respectfully submitted,

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